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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. [redacted] 88

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

SAM BERNSTEIN,
Petitioner.

SEYMOUR A. TERRELL,
Society National Bank Bldg.,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No.

SAM BERNSTEIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered against the above petitioner, in a case in the Supreme Court of Ohio, entitled *State of Ohio vs. Sam Bernstein*,—No. 35,911, on March 4, 1959.

REFERENCE: No Opinion Below.

Neither the Supreme Court of Ohio nor the Court of Appeals of the Eighth Judicial District, Cuyahoga County, No. 24,584, rendered any opinions.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on March 4, 1959; application for rehearing was filed March 17, 1959, and denied March 25, 1959; a copy of the judgment of the Supreme Court of Ohio, the application for rehearing, and entry of denial of rehearing, and of judgment of affirmance of Cuyahoga County Court of Appeals are printed in Appendices A, B and C hereto, *infra*, pp. 8-10.

The jurisdiction is invoked under 28 U. S. C. section 1257 (3).

QUESTIONS PRESENTED.

Was the petitioner denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by the circumstances that he was convicted of a felony under a criminal statute of Ohio when (1) the elements in the indictment were not proved or required to be proved under the charge of the Court of Common Pleas; (2) The Court of Common Pleas told the jury that "a defense of entrapment 'assumes' that the act charged was committed," thus depriving the defendant of trial by jury; (3) that though defendant was charged with both soliciting and accepting money to influence his action, the court held the failure to prove acceptance immaterial, thus allowing a conviction, though the charge was not proved in all its elements; (4) the charge of the Court burdening the defendant with the presumption which he must disprove, when no presumption exists or is to be charged under the circumstances, thus shifting the burden of proof from the State; and (5) requiring a conviction of the defendant if the jury found that the Igoes (persons claimed to have offered the bribe), had a purpose and intent to influence the defendant, when that was no part or element of the indictment;—to all of which prompt and due exception was taken through the courts.

PART OF SECTION OF ARTICLE XIV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INVOLVED.

"* * * (No State shall * * *) nor shall any State deprive any person of life, liberty, * * * without due process of law * * *."

STATEMENT OF THE CASE.

The petitioner was indicted in the Common Pleas Court of Cuyahoga County, Ohio, under Section 2917.01 of the Revised Code of Ohio, entitled "Bribery"—a copy of such indictment, of the statute upon which such indictment was predicated, and Journal Entry of Court of Appeals, appears in Appendices D, E and F, pp. 11-13, *infra*.

The petitioner and defendant was a building inspector of the City of Cleveland and the indictment charged in substance that he "did unlawfully and corruptly solicit and accept from Mable Igoe and Hugh Igoe, One Hundred Dollars ($100.00) to influence his action, opinion and judgment with respect to his official duties."

The evidence of the Igoes in substance was that the petitioner, as a building inspector came to their house because of a complaint that the Igoes had rented the third floor of their house, equipped with stove, kitchen and the means of full use as living quarters, and he told them what they needed to do in order to remedy the violation.

The Igoes promised to make the change so as to comply. He was to come back to see if the change had been made. He was put off to the 13th of September and when he came to make the inspection to see if compliance had taken place, he was told to come back on the 17th since the wife of Mr. Igoe was absent. In the meantime, the tenant had removed and compliance by disconnection had taken place. This, without informing the petitioner.

He came again on the 17th, being a day that the Igoes had arranged for the coming of detectives and contriving a bribery charge.

The detectives employed a device which would enable them to prove acceptance of the money if the petitioner took the money; namely, a specific powder placed

on such money so that whoever touches the same, his hands would show it. The detectives found, on his arrest and so testified, that there was nothing on his (the petitioner's) hands to indicate that he had ever taken any money, which taking he strenuously denied throughout.

The evidence showed that at all times the petitioner was only interested in having the Igoes comply. By complying, the Igoes lost the benefit of renting their third floor and thus came the motive to revenge themselves.

In spite of these facts, the petitioner was convicted.

The charge of the Court of Common Pleas violated due process as we will show below.

The petitioner was convicted and sentenced to the penitentiary.

On appeal to the Court of Appeals, Judge Hurd of the Court of Appeals dissented stating that there was error in the charge of the Court of Common Pleas. Appeal and Motion for Leave was overruled. Application for Rehearing filed and overruled. We shall show below that the existence of the error charged establish a denial of due process in petitioner's conviction.

REASONS FOR GRANTING THE WRIT.

We charge

1. The evidence shows that the petitioner did not accept any money from the prosecuting witness.

There is no basis for a conviction since the indictment had both elements as the basis for the charge. Acceptance was not proved. In 245 S. W. (2d) 704, Syl. 3, *White v. State*, it is held that both solicitation and acceptance of the money must be proved. A conviction on only part of the elements of the charge violates due process.

See 25 Texas 722, *Hewitt v. The State*, and 1 Curtiss 311 (U. S.) *Greene v. Briggs*, pages 325 and 326.

2. The Court charged the Jury "that if the object of its offering and payment (by the Igoes) was to influence the defendant in the performance of his official duties as a building inspector, the offence of bribery was complete," thus authorizing the Jury to convict for the intent and acts of the Igoes.

There is no statute in Ohio, and there was no charge in the indictment which authorized the alleged recipient of money to be convicted because of the intention and purpose of the alleged briber.

This was a violation of due process. See 333 U. S. 196, *Cole v. Arkansas,* where a writ of certiorari held petitioners stood convicted by the State Supreme Court under a criminal statute for violation of which they had not been charged, and the conviction was reversed. See also page 201 of that case.

3. The Court charged the Jury

> "it is a rule of law that every sane person intends the natural and probable consequence of his voluntary acts, unless the evidence is such as to show a lack of intent."

Thus the court made what, at most, would be a presumption of fact binding, and put on the defendant the burden to rebut, by evidence, such presumption.

Further, under the Ohio law and the decisions of other states, no presumption may be charged where there is evidence offered by both sides. See 3 Ohio Cir. Dec. 478, Syl. 15, *Searles v. State;* 45 Ohio App. 410, Syl. 3, *Crobaugh et al. v. State of Ohio,* page 417; 166 O. S. 131, *Ayers v. Woodard,* Syl. 3; 282 S. W. (2d) 533, *State v. Cook,* p. 535; 260 S. W. (2d) 536, *State v. Martin,* Syls. 2, 4, 7, 9, pages 541-546.

Such a charge violates due process. See 342 U. S. 246, *Maresette v. United States*, where the court said:

> "the trial court may not withdraw or prejudge the issue by instructing the Jury that the law raises a presumption of intent from a single act. * * *"

Further on page 275:

> "a presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish give to a proven fact an artificial and fictional effect."

Thus the petitioner was deprived of a jury trial and the burden placed on him instead of the state.

4. The Court charged the jury that because alleged entrapment may be in a case, therefore the guilt of the defendant (petitioner) is thereby to be assumed by the Jury. This is contrary to the decisions of the Supreme Court of the United States where a similar charge was given.

See 287 U. S. 435, *Sorrells v. United States*.

It was there held that it was wrong to claim that a defense of entrapment is an admission of guilt.

We submit that the above shows a departure in the record from due process.

CONCLUSION.

This cause illustrates the very evil, the jurisdiction of the Supreme Court of the United States was designed to remedy; namely, where circumstances exist under which a defendant who has committed no crime, or one not proved to be committed as was charged in the indictment, instructions to the Jury may not be allowed to operate to obtain such a result and a State by its Courts will not be allowed to deprive a petitioner of his liberties, for then the State has acted without due process of law.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAM BERNSTEIN,
Petitioner.

SEYMOUR A. TERRELL,
Of Counsel.

APPENDIX A:

Order of the Supreme Court Overruling Motion for Leave to Appeal.

Mar. 4, 1959:

It is ordered by the Court that this motion be, and the same hereby is, overruled.

APPENDIX B.

Application for Re-Hearing.

To the Honorable Judges of The Supreme Court of Ohio:

Appellant, in conforming with Rule XX of the Supreme Court of Ohio, hereby applies for a rehearing of his motion for leave to appeal, which was overruled, and decision of denial announced March 4, 1959, and respectfully represents that the decision and overruling of the motion for leave to appeal and the judgment thereon are erroneous for the following reasons:

1. Said decision and denial of leave and judgment thereon are contrary to 166 O. S. 131, *Ayers v. Woodward*, Syl. 3; 45 Ohio App. 410, Syl., *C. Crobaugh et al. vs. State of Ohio*; 133 Ohio S. 362, *State of Ohio v. DiAngelo*; 287 U. S. 435, *Sorrels v. United States*, and 245 S. W. (2d) 704, Syl. 3, *White v. State*; and 3 Ohio Cir. Dec. 478, *Searles v. State*.

2. The Common Pleas Court, and the Court of Appeals in affirming the judgment of conviction and sentence of

the defendant-appellant,—and thus the Supreme Court of Ohio, by overruling of the motion for leave to appeal from the judgment of the Court of Appeals, deprives the defendant-appellant of his liberty contrary to Art. I, Bill of Rights, paragraph 5, Constitution of Ohio and Art. I Section 10 thereof and Amendment XIV, Section 1 of the Constitution of the United States, and without due process of law,—and specifically in this, that the elements in the indictment were not proved or required to be proved, and likewise, that the Supreme Court of Ohio, by action overruling the motion for leave to appeal,—and thus affirming the judgment against, and conviction and sentence of the defendant-appellant, as aforesaid, sanctions convictions though (1) the Court told the jury that a defense of entrapment "assumes" that the act charged was committed, thus depriving the defendant of trial by jury; (2) that though defendant is charged with both soliciting and accepting money to influence his action, the failure to prove acceptance is immaterial, thus allowing a conviction though the charge is not proved in all its elements; (3) burdening the defendant with a presumption which he must disprove, when no presumption exists or is to be charged under the circumstances, thus shifting the burden of proof from the State, and (4) requiring conviction of the defendant if they found that the Igoes had a purpose and intent to influence the defendant when that is no part or element of the charge.

WHEREFORE, defendant-appellant respectfully prays that this application be granted.

TERRELL, WILLIAMS AND SALIM,
SEYMOUR A. TERRELL,

Attorneys for Defendant-Appellant.

APPENDIX C.

Order of the Supreme Court Denying Application for Rehearing.

Mar. 25, 1959:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

APPENDIX D.

Indictment.

No. 68776

IN THE COURT OF COMMON PLEAS

CRIMINAL BRANCH.

STATE OF OHIO
CUYAHOGA COUNTY, SS.

In the September Term in the year of our Lord 1957, the jurors of the Grand Jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths in the name and by the authority for the State of Ohio, Do find and present that Sam Bernstein on or about the 17th day of September 1957 at the County aforesaid, was a Building Inspector with the Building Department of the City of Cleveland, a Municipal Corporation and being then and there a duly authorized, qualified and acting inspector, officer, employee and agent of the City of Cleveland and with reference to matters pending and that might require coming before him as such inspector, officer, employee and agent of the said City of Cleveland did unlawfully and corruptly solicit and accept from Mabel L. Igoe and Hugh Igoe a sum of money in the amount of $100.00 to influence the action, opinion and judgment of the said Sam Bernstein with respect to his official duties in the enforcement of and in carrying out the laws of the State of Ohio and the charter provisions and ordinances of the City of Cleveland, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

JOHN T. CORRIGAN,
Prosecuting Attorney.

(Indorsed) a True Bill.

APPENDIX E.

Revised Code 2917.01 (12823) (12824) Bribery.

No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him.

Whoever violates this section shall be imprisoned not less than one nor more than ten years. A person convicted under this section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court.

APPENDIX F.

Journal Entry of the Court of Appeals.

Dated: December 29, 1958.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the majority of the Court, Judge Lee E. Skeel and Judge Julius Kovachy, find no error prejudicial to the appellant (see R. C. 2945.83) and therefore the judgment of the Court of Common Pleas is affirmed, Judge Joy Seth Hurd dissenting for prejudicial error in the charge of the Court of Common Pleas. A careful reading of the bill of exceptions, including the charge given to the jury by the trial court, show that substantial justice has been done the party complaining, to which Judge Joy Seth Hurd, dissents.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 88

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
MERLE M. MCCURDY,
Assistant Prosecuting Attorney,
Criminal Courts Bldg., Cleveland, Ohio,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 971.

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court.

No one of the decisions of this Court, relied upon by the petitioner in his application for this writ, supports his claims in this case, as will be more fully developed below.

The questions presented herein were raised both in the Court of Appeals of Cuyahoga County and the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused to certify and review.

The decisions of the state courts were based on state law. There is, therefore, no substantial federal question involved.

QUESTIONS PRESENTED.

The petitioner was charged with violating section 2917.01 of the Revised Code of Ohio, which reads in part:

> "* * * No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him."

The petitioner was indicted November 20, 1957 under the above-cited statute, the pertinent part of the indictment reading as follows:

> "* * * Do Find and Present, That Sam Bernstein on or about the 17th day of September 1957, at the County aforesaid, was a Building Inspector with the Building Department of the City of Cleveland, a municipal corporation, and being then and there a duly appointed, qualified and acting inspector, officer, employee and agent of the City of Cleveland and with reference to matters pending and that might legally come before him as such inspector, officer, employee and agent of the said City of Cleveland, did unlawfully and corruptly solicit and accept from Mabel L. Igoe and Hugh Igoe a sum of money in the amount of $100.00 to influence the action, opinion and judgment of the same Sam Bernstein with respect to his official duties in the enforcement of and in carrying out the laws of the State of Ohio and the charter provisions and ordinances of the City of Cleveland. * * *"

Most of the five questions presented by the petitioner have to do with evidentiary matter and it is claimed that lack of sufficient proof upon which to base a conviction is ground for review by this Court under the "due process"

clause of Article XIV of the Amendments to the Constitution of the United States.

The question of whether there was sufficient proof to warrant the conviction was resolved in the state courts and this Court has no jurisdiction to review this question under 28 U. S. C. section 1257(3).

In the case of *Waters-Pierce Oil Company v. Texas*, 212 U. S. 86, it was held:

> "The jurisdiction of this court to review the proceedings of the State courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the State court and denied by the rulings and judgment of that court."

The only question presented here is whether this Court has jurisdiction to review this case under the questions presented in petitioner's brief.

STATEMENT OF THE CASE.

Some time prior to August 29, 1957 Sam Bernstein, a building inspector for the City of Cleveland, was given an assignment to investigate a complaint of violation at 13425 Casper Road, the home of Hugh and Mabel Igoe. On August 29, 1957 Bernstein, the petitioner and defendant, went to this residence and found a violation existing in that on each of the three floors there were complete living quarters although the area was zoned for two-family residences. The petitioner informed the owners of the violation and said they would have to comply with the law and that he would return the following Tuesday to make another inspection.

The Igoes then proceeded to evict the tenants on the third floor and to disconnect the cooking facilities and the kitchen sink. When the petitioner returned on September 3, 1957, he told the Igoes that perhaps he could work out a deal whereby they could continue the violation but it would cost them approximately $200. The Igoes said they would have to think it over. Bernstein told them he would be back in a week or two.

The petitioner returned on the 13th of September and said to Mr. Igoe, "Would you like to pay me something now or wait until a later date, and pay me all at once?" Mr. Igoe informed him that Mrs. Igoe was not at home and he would have to come back at a later date, which Bernstein agreed to do.

The Igoes then went to the police and told them what was happening. The police gave them $50 in marked money and instructed them to pay this to the petitioner at a time when it was arranged that detectives would be concealed in the Igoe home.

On September 17th the detectives went to the Igoe residence and concealed themselves in bedroooms adjacent to the dining room. Upon the petitioner's arrival he was invited by Mrs. Igoe to be seated at the dining room table so they could discuss the matter further. In the course of the conversation Mr. Igoe asked, "If we pay you this money what assurance do we have that you won't come back and ask for more?" The defendant answered, "You have no assurance. You are taking a chance on that the same as I am taking a chance on losing my job."

Mrs. Igoe then handed the marked $50 to the petitioner, who told her to lay it on the table, which she did. The petitioner then picked it up, counted it, and laid it back on the table, saying, "I can't accept only fifty; you said half of it; it has to be a hundred dollars; this will take care of the people at City Hall."

Mr. Igoe then went into a bedroom and procured another $50, which the petitioner counted. The petitioner told the Igoes, "This will take care of the people at City Hall. I will come back at a later date for the other money, which will be mine." At this point the detectives came into the room and arrested the petitioner.

ARGUMENT.

Reasons for Not Granting the Writ.

1. It is contended by the petitioner that he did not accept any money from the prosecuting witness.

This is purely a question of fact and was raised and considered by the reviewing courts of Ohio. These courts determined that there was a solicitation and acceptance of the money involved.

The petitioner cites *White v. State*, 245 S. W. (2d) 704, which holds that both solicitation and acceptance of the money must be proved. There is no question but what that is the law. This same cited case was argued in the Appellate Courts of Ohio and considered by them before their final judgments were rendered.

2. It is contended that the jury was authorized to convict for the intent and acts of the prosecuting witnesses under the charge of the court when the court said "that if the object of its offering and payment (by the Igoes) was to influence the defendant in the performance of his official duties as a building inspector, the offense of bribery was complete."

The State did not base its prosecution of the petitioner on the intentions of the Igoes. The evidence as disclosed by the record is that the petitioner Bernstein solicited and accepted a bribe; that pursuant to their conversations with the petitioner the Igoes paid the money to

him presumably to influence him in the performance of his official duties as a building inspector. It was imperative that the money be paid for that specific purpose. The above-quoted instruction upon which petitioner makes this claim of error is taken completely out of context since the court also charged that it was incumbent upon the State to prove beyond a reasonable doubt that the petitioner solicited and accepted the said thing of value, to-wit, money, from Mabel L. Igoe and Hugh Igoe to influence him with respect to his official duties as a building inspector in the enforcement of the laws of the State of Ohio and the ordinances of the City of Cleveland then and there in effect. We submit that when the entire charge of the court is taken into consideration, this claim of error has no foundation.

Petitioner cites 333 U. S. 196, *Cole v. Arkansas*. Clearly this case has no application here. In that case the petitioner was tried and convicted under information charging him only with violation of section 2 of a state statute. He appealed to the State Supreme Court contending that section 2 was contrary to the Federal Constitution. Without passing on that question the State Supreme Court sustained the conviction on the ground that the evidence showed that the petitioner had violated section 1 of the same statute which describes an entirely different offense. This Court held that the petitioner was denied due process of law and reversed the judgment and remanded. There is no such question at issue in the instant case.

3. The petitioner contends that an undue burden was put on him when the court charged the jury "it is a rule of law that every sane person intends the natural and probable consequence of his voluntary acts, unless the evidence is such as to show a lack of intent."

Petitioner says further that this is a presumption of fact. We contend that it is a presumption of law.

While this portion of the court's charge is a correct statement of law, had the court omitted it entirely neither the prosecution nor the petitioner would thereby have been prejudiced. Its inclusion, even as surplusage, likewise did not constitute error and the petitioner was in no way damaged by such inclusion.

In *Searles v. State*, 3 O. C. D. 478, cited by petitioner, the court charged, in part, "should you find * * * that the natural and probable consequence of its (building) being burned would be to prejudice, damage or defraud such insurance company, then you will find such burning to be with the intent to prejudice, damage and defraud such company." The appellate court held such charge erroneous as tending to mislead the jury into misapplying a general rule of law and as treating the presumption alluded to as conclusive. In the case here on appeal, however, the charge did not tend to mislead the jury. It was at most a statement of a general rule of law. Nowhere did the court say or infer that this rule of law is conclusive for it qualified the statement by adding "unless the evidence is such as to show a lack of intent."

As to *Crobaugh v. State*, 45 O. App. 410, cited by petitioner, there the court went further than the portion of the charge quoted in petitioner's brief by adding, "All the state has to prove are acts the natural and probable consequences of which are to deceive."

The petitioner cites 342 U..S. 246, *Maresette v. United States*. This case arose out of a larceny of federal property. The trial court instructed the jury that the law raises a presumption of intent from the single act of stealing. This Court said:

> "As we read the record, the case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court, (b) as a presump-

tion of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. * * *

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

This case, we contend, has no application to the instant case.

In petitioner's question No. 4, he alleges that, "The Court charged the jury that because alleged entrapment may be in a case, therefore the guilt of the defendant (petitioner) is thereby to be assumed by the Jury."

The petitioner has neither quoted any portion of the charge nor cited any page in the record or other reference to entrapment. We cannot find any place in the charge of the court as set forth in the record where the court made any such charge.

CONCLUSION.

In conclusion, we submit that there is no substantial federal question involved, and that there is no debatable constitutional question involved herein, and that under the questions presented in the petitioner's brief this Court has no jurisdiction to review this case and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
MERLE M. MCCURDY,
Assistant Prosecuting Attorney,
Criminal Courts Bldg., Cleveland, Ohio,
Attorneys for Respondent.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted]

SAM BERNSTEIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF PETITIONER IN REPLY.

SAM BERNSTEIN,

Petitioner.

SEYMOUR A. TERRELL,

Society National Bank Bldg.,
Cleveland, Ohio,

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BRIEF OF PETITIONER IN REPLY.

JURISDICTIONAL QUESTION PRESENTED BY THE RECORD.

In the Court of Appeals of Ohio, one of the judges found error in the instructions warranting a new trial.

All that is said by respondent under Objections To Jurisdiction is merely gratuitous; merely because the lower courts ignored the Constitutional rights of petitioner cannot overcome the cogent authorities presented in the Petition.

DENIAL OF DUE PROCESS OF LAW PRESENTED.

The petition does not seek jurisdiction on an evidentiary matter, but for a denial of the Constitutional rights, under which the petitioner was convicted without evidence and contrary to the requirements of due process.

RESPONDENT'S STATEMENT OF THE CASE IS NOT ADEQUATE.

It omits the steps which show the scheme to contrive a claim of bribery; and the conclusive fact, that the petitioner could not have received or accepted any money. It is nowhere denied in the record that a specific powder was placed on the Igoes' money, so that whoever touched the same, his hands would show it. The detectives found —on petitioner's arrest, and so testified, that there was —nothing on his (petitioner's) hands, indicating that he had ever taken any money.

REPLY TO ARGUMENT.

1. Respondent cannot claim that there is a mere question of fact, when the record shows conclusively the absence of acceptance of the money.

Since solicitation and acceptance were both required, there could be no conviction, and due process, since that element of the alleged crime was not proved.

2. Respondent cannot evade the effect of the court's charge to the jury that the intent of the Igoes was only necessary to make petitioner guilty (see page 5, Petitioner's Brief), by saying "the State did not base its prosecution on the intention of the Igoes."

A reading of *Cole v. Arkansas*, 333 U. S. 196, will show its application at bar.

3. Respondent is manifestly unfair, when it says that the charge did not contain the words quoted in Item 2 of petitioner's Questions Presented and referred to also on page 6 of the petition.

4. Respondent cannot evade the authorities on pages 5 and 6 of petition by saying that the petitioner claims the

charge was only of a presumption of fact. Petitioner says that the charge was a charge of presumption of law, so that petitioner was required to prove his innocence, and the State was relieved of the burden. The case is governed by 342 U. S. 246, *Maresette v. United States* which cannot be distinguished.

Respondent knows that the briefs in the Supreme Court of Ohio did contain this item, and there was quoted the charge in the Bill of Exceptions, page 444, and as follows:

> "In support of his plea of not guilty, Sam Bernstein sets up the defense of entrapment. * * * It is a positive defense and necessarily assumes that the act charged was committed."

Respondent is conscious that 287 U. S. 435, *Sorrells v. United States,* holds such a charge violates the petitioner's Constitutional rights, and, therefore, makes the statement in its brief contrary to what is contained in the Bill of Exceptions from which we have quoted above.

Petitioner submits that the petition shows the petitioner has been denied due process of law, and that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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